No. 14624

United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSENMEYER, Formerly Florence Lee,

Appellees.

APPELLANT'S REPLY BRIEF TO BRIEF OF APPELLEE, ARTHUR L. LEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5–55

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Appeal from the United States District Court for the District of Oregon

REPLY TO ARGUMENT THAT NO VALID BASIS FOR INTERPLEADER EXISTS

Appellant commenced this case in the United States District Court for the District of Oregon under the Federal Interpleader Statute (28 U.S.C.A. 1335) which gives the District Court jurisdiction of any civil action of interpleader or in the nature of interpleader. Appellee Arthur L. Lee first contends and argues that appel-

lant did not meet the requirements of a civil action of interpleader because it was not a neutral stakeholder. The factual situation proves otherwise and an examination shows that at the time of the commencement of this civil action the appellant stood as a neutral stakeholder of the cash surrender value of the policy of insurance which was the money or property or benefits arising by virtue of such policy or instrument or obligation.

The policy of insurance sets forth the "Benefits on Surrender or Lapse" (R. 60) and under the provisions of this section of the policy the insured may, after two full annual premiums have been paid and within three months after any default in payment of premium, but not later, surrender the policy and (a) receive its cash surrender value or (b) receive non-participating paid-up insurance. However, if the insured shall not within three months of any default in payment of premium surrender the policy and receive the cash surrender value or receive non-participating paid up insurance, then the insurance shall be automatically continued as temporary (or extended term) insurance without the right to the cash surrender value of the policy of insurance.

In this case the insured was advised by the appellant in a letter on December 18, 1952 (R. 64) that premiums on the policy were paid to November 6, 1952, and the cash value would be available until February 6, 1953, (or within three months of the defaulted premium which was due November 6, 1952). Further that if he desired the cash value while available, he should return the pol-

icy (surrender it) with attached request for the cash value signed by the insured and consented to by Florence Grusenmeyer and the cash value would be paid to the insured.

Then on January 13, 1953, by letter (R. 66) the appellant called the insured's attention to its prior letter of December 18th and also that the cash surrender value would be available until February 6, 1953, providing no further premiums are paid.

Since appellee Arthur L. Lee did not on or prior to February 6, 1953, surrender the policy of insurance and submit the request for cash value signed by himself and consented to by Florence Grusenmeyer, the insurance was, according to its terms, automatically continued for the face amount of the policy as temporary (or Extended Term) insurance and appellee Arthur L. Lee was so notified by letter dated June 5, 1953 (R. 67).

After February 6, 1953, the date on which the policy of insurance was automatically continued as Temporary Insurance and in May, 1953, appellee Arthur L. Lee commenced his action in the Circuit Court of the State of Oregon for the County of Multnomah seeking the recovery of the cash surrender value.

Thereafter and in July, 1953, appellant filed this interpleader suit and paid the cash surrender value of the policy into the registry of the Court.

It is now contended by appellee Arthur L. Lee that since the policy of insurance at the time he started his State Court case for the cash surrender value was continued as Temporary Insurance that appellant was not

a neutral stakeholder as required in interpleader suits. This may be maintainable by the appellee Arthur L. Lee except for the fact that the appellant, for the purposes of this interpleader suit and in order to give both claimants to the fund an opportunity to assert their claims and have them determined in a Court where jurisdiction over both appellee Arthur L. Lee and appellee Florence Grusenmeyer could be had, waived the strict requirements of the policy and paid the cash surrender value into the registry of the Court. Certainly at the time of the commencement of this suit appellant was a neutral stakeholder of the fund in question.

The next point made by the appellee Arthur L. Lee under his contention that "No valid basis for interpleader exists" is that appellant did not pay into Court a sufficient amount or file a sufficient bond to cover the amount claimed by appellee Lee. Here the appellee Arthur L. Lee first goes into an explanation of the essential difference between a "strict bill in interpleader" and "a bill in the nature of interpleader" and cites cases in which the distinction has been discussed. From an examination of the authorities cited we find the essential difference being not as stated by appellee Arthur L. Lee but rather that in a strict bill in interpleader the plaintiff as stakeholder must not have any interest in the fund or claim thereto adverse to any of the defendants who are claimants thereto. While in a bill in the nature of an interpleader the plaintiff need not be a mere stakeholder but may claim an interest in the fund or subject of the controversy between the defendants or claimants.

Appellee Arthur L. Lee argues that this is a bill in the nature of interpleader because his claim is for the cash surrender value of the policy of insurance of $1,-711.25 with interest, attorneys' fees and costs and appellee Florence Grusenmeyer's claim is for the cash surrender value of $1,711.25.

Therefore, the plaintiff by paying into Court the cash surrender value of $1,711.25 and not filing a bond or paying a larger amount into Court to cover the interest, costs and attorneys' fees, said appellee Arthur L. Lee contends that plaintiff is claiming an interest in the fund or subject of the controversy.

We point out to the Court that the plaintiff is not in any manner asserting or making any claim whatsoever to the amount due on the policy of insurance, that is the cash surrender value of $1,711.25. That is the amount which both claimants agree or admit or contend to be due on the policy (R. 37, Finding XVII). The cash surrender value of $1,711.25 is the amount due on the obligation according to its terms and conditions.

It is true that the appellee Arthur L. Lee has demanded interest, attorneys' fees and costs, but such a claim on his part for something over and beyond the agreed amount of the fund or cash surrender value of the policy does not create an interest on the part of the plaintiff in the fund or subject of the controversy so as to construe this suit as anything other than a bill in interpleader. Where is the claim or interest of the plaintiff in the fund or subject of the controversy between the defendants or appellees herein? Nowhere has the

appellee Arthur L. Lee pointed to any such rights under the terms of the policy because no such right for attorneys' fees, interest or costs are provided for.

The appellees both claim the fund that is the cash surrender value of the policy and appellant is a disinterested stakeholder and complied with the requirements of the Federal Interpleader Statute.

The case of Federal Life Insurance Company vs. Looney, 180 Ill. App. 488, cited by appellee Arthur L. Lee was decided in May, 1913, by the Illinois Appellate Court, First Division, and the facts in that case are that each of two claimants were claiming an entirely different amount to be due as the fund payable by the plaintiff insurance company and the plaintiff had not, as in the instant case, paid into Court the amount due on the policy of insurance. The amounts due each claimant had been previously determined by other litigation in the Tennessee Supreme Court.

In the next case cited by the appellee Arthur L. Lee, Connecticut General Life Insurance Company vs. Yaw, 53 F. 2d 684, is a District Court of New York case decided in November, 1931, in that case the face amount of the policy was $1,000.00 and at least one claimant contended such amount with interest to be due. The plaintiff denied the face amount of the policy to be due and paid into Court only $841.45 at the time of filing its interpleader. This created a dispute as to amount owed by the plaintiff. This is a different situation from that in the case at bar where the amount of the obligation of the policy is not in dispute. It is agreed by all

parties that the cash surrender value is $1,711.25, the amount paid into Court by appellant.

The cases of Heineman vs. Heineman, et al., 50 F. 2d 696, and Hooper vs. Carlson, 134 Or. 241, 293 P. 410, are not interpleader cases and only stand for the proposition that the plaintiff in interpleader must be a disinterested stakeholder of the fund or property and that the bill must allege the true amount owing. Appellant herein is a disinterested stakeholder of the fund, cash surrender value of the property, and has alleged in his bill the true amount owing.

The appellee Arthur L. Lee cites two further cases, U. S. vs. Sentinel Fire Insurance Company, 178 F. 2d 217, and John Hancock Mutual Life Insurance Company vs. Kegan, 22 Fed. Supp. 326. The facts in these cases are entirely different from the case before this Court. In the first case which resulted from a fire loss on a policy of fire insurance of the face amount of $17,000.00 the plaintiff admitted the fire loss and their liability to be $14,133.33 while the claimants contended for the face amount of the policy of $17,000.00. The facts of this case support a controversy as to the amount due on the policy, which is not the situation in the instant case.

REPLY TO ARGUMENT THAT THERE ARE NOT TWO ADVERSE CLAIMANTS

Appellee Arthur L. Lee next contends that there are not two adverse claimants. His argument first is that even though appellee Florence Grusenmeyer had twice communicated with appellant in writing, each time claiming some interest in the policy (R. 54-55) and appellant's knowledge that appellee Lee and appellee Grusenmeyer resided for some time in a community property state (California) (R. 21) that appellant should have evaluated her claim and decided that she had no maintainable claim. The very purpose of interpleader is to give the stakeholder an opportunity to eliminate the risk of additional liability from guessing wrong as between adverse claimants. It is not appellant's burden to decide on the merits of the claims. The fact that an adverse claim was being made is sufficient and in this case not only did appellee Grusenmeyer assert her claim on two occasions but after service of summons and complaint in the interpleader action she appeared and answered claiming the entire fund deposited in the registry of the Court.

In the case of Metropolitan Life Insurance Company vs. Segaritis, et al., 20 F. Supp. 739, one of the defendants and a claimant made the same argument and contention as appellee Arthur L. Lee, and the Court at page 741 stated "it has become clear that the jurisdiction of this Court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in al-

most every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and can not affect the jurisdiction of the Court."

The net cash value of the policy at the time of the annulment does not alter the situation. It is not a question of the amount involved. The fact is that appellee Grusenmeyer was asserting a claim to the policy or proceeds adverse to the appellee Arthur L. Lee and that is sufficient to meet the statutory requirements of interpleader.

In reply to appellee Arthur L. Lee's statement, page 11 of his brief, to the effect that appellee Grusenmeyer had no rights in and to the policy as such, we call the Court's attention to the case of Blethen vs. Pacific Mutual Life Insurance Company of California, et al., 198 Cal. 91, 243 P. 431, in which the Court considered the question presented which was

> "The principal question presented by this appeal is whether or not a surviving wife may maintain an action against an insurance company to recover her community interest in the proceeds of a life insurance policy issued to her husband and made payable to a beneficiary other than the wife, without the wife's consent, the premiums of which have been paid out of community funds, after the insurance company, in good faith without notice of adverse claim thereto, has made full payment on the policy to the beneficiary designated in the policy."

The facts were substantially the same as in the case at issue except that no notice of adverse claim was made until some ten months after the insurance com-

pany had paid the money to the beneficiary under the policy and the plaintiff, the adverse claimant, sued the insurance company for her share of the proceeds of the policy of insurance. In answering this question the Court decided in the negative because no notice of the adverse claim had been given the insurance company.

In this case appellee Grusenmeyer first gave notice of her claim or refusal to consent to a disposition of her community interest in said policy or proceeds on December 21, 1932 (R. 54), and appellant was on notice thereafter.

Examining the cases cited by appellee Lee (Br. of A. Lee, page 11) in support of his contention, we find that in McEwen vs. New York Life Insurance Company, 23 Cal. App. 694, 139 P. 242, the facts to be that the plaintiff was the mother of the insured and sought to recover the proceeds of a policy of insurance on the life of her deceased son and in which she was named as beneficiary. The insured had the right to change the beneficiary but had not done so prior to his death. The defendant insurance company defended on the ground that material misrepresentations had been made by insured in the application. Plaintiff contended that she had a vested interest in said policy by being named as beneficiary. In deciding in favor of the defendant company the appellate Court said that since the insured had the right to change the beneficiary named in the policy, it must follow that plaintiff had no vested interest therein. This case is not in point. There was no husband and wife relationship or question of community funds or property.

In Shoudy vs. Shoudy, 55 Cal. App. 447, 203 P. 437, cited by appellee Lee, we find that the community rights of the plaintiff, who was the divorced wife of the insured and a former beneficiary under the terms of a policy of insurance, had been settled and terminated in the divorce proceeding. In the case before this Court such was not the case. The annulment proceedings did not determine the community rights or any property rights (R. 36, Finding XIV) of appellee Florence Grusenmeyer and her community rights in the policy of insurance are still available to her.

REPLY TO ARGUMENT ON ATTORNEYS' FEES

In this case the appellant acted in good faith. As early as March 5, 1951, appellee Arthur L. Lee knew that no transaction under the policy of insurance could be made without the consent of Florence Lee (Grusenmeyer) (R. 63). On December 1, 1952, appellee Arthur L. Lee made his demand for the cash surrender value of the policy (R. 37, Finding XVII) and on December 18, 1954, he was advised by appellant that he could surrender the policy according to its terms but that the cash surrender value could not be paid to him alone without the consent of Florence Grusenmeyer in view of her claim (R. 64). No response of any kind was made by appellee Arthur L. Lee thereafter and appellant had the right to assume that some effort was being made to secure the consent of appellee Grusenmeyer. Then on May 4, 1953, within 5 months of his demand

and notice from appellant of the requirement for appellee Lee to receive the cash surrender value he commenced his action in the State Court against appellant (R. 5).

Appellee Arthur L. Lee now seeks to penalize the appellant for giving him an opportunity to resolve the conflicting claims.

In the case of New York Life Insurance Co. vs. Veith (Texas Civil Appeals), 192 S.W. 605, cited by appellee Arthur L. Lee, the facts were that the plaintiff insurance company refused to pay anything on the ground that the wife, who was the beneficiary, had murdered her husband, the insured, and maintained this position for one complete year before filing its interpleader. There is no analogy between such a situation and the facts in this case.

In the case of Andrews vs. Travelers Insurance Co. (Ga.), 89 S.E. 522, the opinion of the Court did not even discuss the Headnote or Syllabus of the reporter.

In the case of Metropolitan Life Insurance Co. vs. Brown (Mo.), 186 S.W. 1155, the case was decided on a demurrer sustained to the petition by the only claimant and defendant to appear and the Court said, "Plaintiff had no reason to be in doubt either in law or in fact as to whom it might pay the fund and thus discharge itself."

We recognize that there are situations and circumstances under which attorneys' fees are allowed against insurance companies when payment of claims have not

been made but this is not one where any allowance should be made.

Within a reasonable time and without undue delay, the appellant commenced its interpleader suit in the District Court where jurisdiction of both appellee Lee, a resident of Oregon, and appellee Grusenmeyer, a resident of California, could be maintained and be given the right to litigate their claims.

Appellee Lee admits that one of the reasons for the dismissal of appellant's interpleader by the Trial Court was attorneys' fees (R. 31). If the requirements of the Federal Interpleader Statute are present, then we submit that this issue should not have been the basis for the Trial Court's decision.

Appellant is not conceding that appellee Lee would be entitled to attorneys' fees in his state action. In any event this is not the forum to litigate that question and should have no bearing on the question before this Court.

CONCLUSION

It is respectfully submitted that judgment of the District Court should be reversed and appellant granted the relief prayed for in its complaint for interpleader.

Respectfully submitted,

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